

CALIFORNIA LAW REVISION COMMISSION

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January 28, 1994

<i>Date:</i>	February 10-11, 1994	<i>Place:</i>	Sacramento
	February 10 (Thursday) 10:00 am – 5:00 pm		State Capitol, Room 3191
	February 11 (Friday) 9:00 am – 4:00 pm		Office of Legislative Counsel 925 L Street, Lower Level
<p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the "California Law Revision Commission".</p>			

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

February 10-11, 1994

1. MINUTES OF JANUARY 6-7, MEETING
(sent 1/14/94)

2. ADMINISTRATIVE MATTERS

Communications from Interested Persons

3. TRIAL COURT UNIFICATION (Study J-1000)

Final Report on SCA 3 (Information Only)

Memorandum 94-8 (NS) (sent 1/19/94)

First Supplement to Memorandum 94-8 (enclosed)

Transitional Provisions (Study J-1090)

Memorandum 94-9 (NS) (sent 1/24/94)

Authority of Attorney General (Study J-1150)

Memorandum 94-12 (BSG) (enclosed)

4. COMPREHENSIVE POWERS OF ATTORNEY STATUTE (Study L-3044)

Draft of Final Recommendation

Memorandum 94-10 (SU) (to be sent)

5. ADMINISTRATIVE ADJUDICATION (Study N-100)

Exemptions from Adjudication Provisions of Administrative Procedure Act

Memorandum 94-11 (NS) (sent 1/20/94) (\$5.50)

Tentative Recommendation on Administrative Adjudication
(sent previously) (\$25.00)

Special
Order of
Business:
Feb. 10 at
1:00 pm

Alcoholic Beverage Control Appeals Board

First Supplement to Memorandum 94-11 (sent 1/25/94) (\$5.50)

Coastal Commission

Second Supplement to Memorandum 94-11 (sent 1/26/94) (\$8.50)

Department of Corrections and related entities:

- Board of Prison Terms
- Youth Authority
- Youthful Offender Parole Board
- Narcotic Addict Evaluation Authority

Third Supplement to Memorandum 94-11 (sent 1/21/94) (\$8.50)

Department of General Services

Fourth Supplement to Memorandum 94-11 (sent 1/25/94) (\$5.50)

Department of Health Services

Fifth Supplement to Memorandum 94-11 (to be sent)

Occupational Safety and Health Appeals Board

Sixth Supplement to Memorandum 94-11 (sent 1/27/94) (\$5.50)

Public Employment Relations Board

Seventh Supplement to Memorandum 94-11 (to be sent)

Public Utilities Commission

Eighth Supplement to Memorandum 94-11 (sent 1/26/94) (\$18.00)

Department of Real Estate

Ninth Supplement to Memorandum 94-11 (sent 1/26/94) (\$8.50)

Department of Social Services

Tenth Supplement to Memorandum 94-11 (to be sent)

Office of Statewide Health Planning and Development

Eleventh Supplement to Memorandum 94-11 (sent 1/27/94) (\$8.50)

Unemployment Insurance Appeals Board

Twelfth Supplement to Memorandum 94-11 (enclosed) (\$8.50)

Agricultural Labor Relations Board

Thirteenth Supplement to Memorandum 94-11 (to be sent)

State Water Resources Control Board

Fourteenth Supplement to Memorandum 94-11 (to be sent)

Other Agencies

Fifteenth and Succeeding Supplements to Memorandum 94-11 (to be sent)

Comments on Tentative Recommendation (Sections 612.120-641.110)

Memorandum 94-13 (NS) (sent 1/24/94) (\$5.50)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
FEBRUARY 10-11, 1994
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on February 10-11, 1994.

Commission:

Present: Sanford Skaggs, Chairperson
Daniel M. Kolkey, Vice Chairperson
Christine W.S. Byrd (Feb. 10)
Allan L. Fink (Feb. 11)
Arthur K. Marshall (Feb. 10)
Edwin K. Marzec
Colin Wied (Feb. 11)

Absent: Terry B. Friedman, Assembly Member
Bion M. Gregory, Legislative Counsel

Note: Tom Campbell is newly appointed Senate Member, replacing Bill Lockyer

Staff:

Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel (Feb. 10)
Robert J. Murphy, Staff Counsel (Feb. 10)

Consultants:

Michael Asimow, Administrative Law

Other Persons:

Gina S. Berry, Prisoners' Rights Union, Sacramento (Feb. 10)
Steve Birdlebough, Judicial Council of California, Sacramento (Feb. 10)
Herb Bolz, Office of Administrative Law, Sacramento
Lawrence Brown, California District Attorney's Association, Sacramento (Feb. 10)
James Browning, Parole Hearings, Department of Corrections, Sacramento (Feb. 10)
Dana Callihan, California Student Aid Commission, Sacramento (Feb. 10)
Lonnie M. Carlson, Administrative Adjudications Division, California Department of Social Services, Sacramento (Feb. 10)
John Castello, State Department of Social Services, Sacramento (Feb. 10)
William M. Chamberlain, California Energy Commission, Sacramento
Michael M. Connolly, Parole Hearings Division, Department of Corrections, Sacramento (Feb. 10)

Taylor S. Corey, Department of Health Services, Sacramento
Dorothy Dickey, Coastal Commission, San Francisco (Feb. 10)
Elaine W. Donaldson, Occupational Safety and Health Appeals Board, Sacramento (Feb. 11)
Peter Douglas, California Coastal Commission and San Francisco Bay Conservation and Development Commission, San Francisco
Tom Dresslar, LA Daily Journal, Sacramento (Feb. 10)
Gilford M. Eastham, Department of Social Services, Sacramento (Feb. 10)
William B. Eley, Alcoholic Beverage Control Appeals Board, Sacramento (Feb. 10)
Ralph Faust, Coastal Commission, San Francisco (Feb. 10)
Jeffrey Fine, Unemployment Insurance Appeals Board, Sacramento (Feb. 11)
William Foley, California Public Utilities Commission, San Francisco (Feb. 10)
Gary Gallery, Public Employment Relations Board, Sacramento (Feb. 11)
Beth Herse, Office of Statewide Health Planning and Development, Sacramento (Feb. 10)
Gary Hori, Commission on State Mandates, Sacramento (Feb. 10)
Floyd Lasley, Department of Health Services, Sacramento (Feb. 10)
Heather Mackay, Prison Law Office, San Quentin (Feb. 10)
Charlene Mathias, Office of Administrative Law, Sacramento
R.D. Murchison, Sacramento (Feb. 10)
Bob Murray, Agricultural Labor Relations Board, Sacramento (Feb. 11)
Gary Ness, Department of General Services, Sacramento (Feb. 10)
Ted O'Toole, California Student Aid Commission, Sacramento (Feb. 10)
Ron Overholt, Alameda County Superior Court, Oakland (Feb. 10)
Brian Putter, Franchise Tax Board, Sacramento (Feb. 10)
Dick Ratliff, California Energy Commission, Sacramento (Feb. 10)
John W. Rosskopf, Office of Statewide Health Planning and Development, Sacramento (Feb. 10)
Charlotte Sato, California Attorney General's Office, Sacramento (Feb. 10)
Marilyn Schaff, Department of Motor Vehicles, Sacramento (Feb. 10)
Daniel L. Siegel, Office of the Attorney General, Sacramento
John Sikora, Association of California State Attorneys and Administrative Law Judges, Sacramento (Feb. 10)
James D. Simon, State Department of Social Services, Sacramento (Feb. 10)
Alan Slater, Orange County Superior Court, Santa Ana (Feb. 10)
B. Smith, LA Met-News, Los Angeles (Feb. 10)
Thomas J. Stikker, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (Feb. 10)
Marcia Taylor, Judicial Council/Administrative Office of the Courts, San Francisco (Feb. 10)
Linda Theuriet, Administrative Office of the Courts, San Francisco (Feb. 10)
Roger K. Warren, Judicial Council of California, Sacramento (Feb. 10)
Stuart A. Wein, Occupational Safety and Health Appeals Board, Sacramento
Robin T. Wilson, Department of Real Estate, Sacramento (Feb. 10)
James Wolpman, Agricultural Labor Relations Board, Sacramento
Steve Zimmerman, Commission on State Mandates, Sacramento (Feb. 10)

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MINUTES OF JANUARY 6-7, 1994, MEETING

The Minutes of the January 6-7, 1994, meeting were approved as submitted by the staff, except that on page 6, the second full paragraph was revised to read:

The comments at page 21 of the tentative recommendation regarding comparative screening of municipal and justice court judges were deleted.

ADMINISTRATIVE MATTERS — MEETING SCHEDULE

In light of the change in schedule on the trial court unification study, the Commission decided to cancel the meetings previously scheduled for March and June 1994, to change the location of the July 1994 meeting to Sacramento, and to add a December 8-9, 1994, meeting in San Francisco, as follows:

May 1994

May 12 (Thur.)

May 13 (Fri.)

Sacramento

10:00 am - 5:00 pm

9:00 am - 4:00 pm

July 1994

July 14 (Thur.)

July 15 (Fri.)

Sacramento

10:00 am - 5:00 pm

9:00 am - 4:00 pm

September 1994

Sep. 22 (Thur.)

Sep. 23 (Fri.)

Sacramento

10:00 am - 5:00 pm

9:00 am - 4:00 pm

November 1994

Nov. 10 (Thur.)

Nov. 11 (Fri.)

Los Angeles

10:00 am - 6:00 pm

9:00 am - 4:00 pm

December 1994

Dec. 8 (Thur.)

Dec. 9 (Fri.)

San Francisco

10:00 am - 6:00 pm

9:00 am - 4:00 pm

In view of cancellation of the March and June meetings, the Commission authorized the staff to confer with the Chairperson and Vice Chairperson as necessary to deal with problems that may arise on the Commission's 1994 legislative program.

STUDY J-1000 – TRIAL COURT UNIFICATION: STATUS OF SCA 3

The Executive Secretary reported that Senator Lockyer's most recent draft of SCA 3 differs in some respects from the version in the Commission's report to the Legislature on trial court unification. In particular, Senator Lockyer's draft provides that a vote to fill a vacancy on the unified court shall be held at the next general election following the *second* January 1 after the vacancy occurs. The Commission's report recommended that the vote occur at the next general election following the *third* January 1 after the vacancy occurs.

Additionally, Senator Lockyer's current draft would put SCA 3 on the November 1994 ballot, rather than on the June 1994 ballot, with the operative date extended to July 1, 1996. The Commission considered these changes and how they would affect the Commission. If the vote on SCA 3 is delayed to November 1994, the Commission will nonetheless wait until after the vote to meet regarding statutory revisions to implement trial court unification. The staff should continue to work on the statutory revisions in advance of the election, and is authorized to consult with and collect information from outside sources in connection with this work.

The Commission also considered a letter from Justice Anderson regarding the Commission's report to the Legislature on trial court unification. See First

Supplement to Memorandum 94-8, Exhibit pp. 1-3. In the letter, Justice Anderson reiterates his concerns regarding the effect of trial court unification on the workload of the Courts of Appeal. He urges adoption of statutes to address this anticipated problem. The Executive Secretary observed that since problems regarding the workload of the Courts of Appeal could be addressed through statutes, no change in the Commission's constitutional recommendation is necessary. He suggested monitoring the situation as it develops and addressing any problems when and if they occur. The Commission agreed with this approach.

STUDY J-1150 – TRIAL COURT UNIFICATION: AUTHORITY OF THE ATTORNEY
GENERAL

The Commission considered Memorandum 94-12 and the First and Second Supplements to Memorandum 94-12 regarding the authority of the Attorney General under Article V, Section 13 of the California Constitution. At its January 1994 meeting, the Commission concluded that trial court unification should not alter the scope of the Attorney General's prosecutorial power.

The Attorney General and the District Attorneys Association have now reached a consensus that the best means of achieving this goal would be not to amend Article V, Section 13. See First Supplement to Memorandum 94-12, Exhibit p. 16; Second Supplement to Memorandum 94-12, Exhibit p. 1. In light of this unanimity of opinion among the affected parties, the Commission decided to supplement its report to the Legislature to endorse this approach.

Accordingly, the Commission approved the proposed supplemental report at pages 2-3 of the First Supplement to Memorandum 94-12, except for the last paragraph of the proposed Comment to Article VI, Section 10 (original jurisdiction), which states:

Expansion of the jurisdiction of the superior court to all causes is not intended to alter the meaning of language in Article V, Section 13 relating to the authority of the Attorney General to prosecute violations of law of which the superior court has jurisdiction. Trial court unification should not result in any change in the Attorney General's authority and that authority remains the same as it was before unification.

It was suggested that referring to “violations of law **of which the superior court has jurisdiction**” (emphasis added) might add further confusion regarding the scope of the Attorney General’s prosecutorial authority. Thus, with joint concurrence of the Attorney General and the District Attorneys Association, the Commission decided to modify the first sentence of the paragraph to read: “Expansion of the jurisdiction of the superior court to all causes is not intended to alter the meaning of language in Article V, Section 13 relating to the authority of the Attorney General to prosecute violations of law.” The remainder of the paragraph remains unchanged.

STUDY J-1150 – TRIAL COURT UNIFICATION: TRANSITIONAL PROVISIONS
(PERSONNEL DECISION STRUCTURE)

The Commission considered Memorandum 94-9 and the First Supplement to Memorandum 94-9 regarding the structure for making personnel decisions necessary to implement trial court unification. In Memorandum 94-9, the staff summarized a study that the Justice Management Institute prepared for the Judicial Council regarding effective decision-making mechanisms for trial court coordination in California. Based on the study, the staff recommended adoption of the following statutes:

Gov’t Code § 70200 (added). Transitional rules of court

70200. The Judicial Council shall, before January 1, 1996, adopt rules not inconsistent with statute for:

(a) The orderly conversion on January 1, 1996, of proceedings pending in municipal and justice courts to proceedings in superior courts, and for proceedings commenced in superior courts on and after January 1, 1996.

(b) Selection of persons to coordinate implementation activities for the unification of municipal and justice courts with superior courts in each county, and selection of persons to serve as presiding judges of the superior courts on and after January 1, 1996.

(c) Preparation of any necessary local court rules that shall, on January 1, 1996, be the rules of the superior court.

Gov’t Code § 70201 (added). Presiding judge

70201. (a) Immediately on or after June 8, 1994, the judges of the superior, municipal, and justice courts in each county shall select a presiding judge for unification of the municipal and justice courts with the superior court in that county.

(b) The presiding judge for unification has the full authority of the court to make all decisions and perform all acts necessary for unification. The authority of the presiding judge for unification includes decisions and acts effective before, as well as on or after, January 1, 1996.

Gov't Code § 70202 (added). Selection of administrative officer

70202. The presiding judge shall select an administrative officer to coordinate implementation of unification activities.

Gov't Code § 70203 (added). Appointment of committees

70203. The presiding judge shall establish and receive the advice and assistance of such committees as are appropriate concerning any matter relating to unification of the trial courts. The committees shall be composed of judges, court officers, court employees, or other interested persons that the presiding judge believes may best contribute to the implementation process. Where appropriate, the presiding judge may appoint an outside facilitator to help the work of committees.

Gov't Code § 70204 (added). Court employees

70204. The authority of the presiding judge for unification includes, but is not limited to adoption of a personnel plan or merit system for court-appointed employees, which may be the same as the county personnel plan, that provides for wage and job classification, benefits, qualifications, recruitment, selection, training, promotion, retirement, discipline, and removal of employees of the court. The personnel plan may include determination of relative seniority rights of employees of the municipal, justice and superior courts, layoff and attrition procedures, and assignment and relocation among court branches. The presiding judge for unification may negotiate collective bargaining agreements and memoranda of understanding, execute contracts, and make assignments and give notices effective before, on, or after January 1, 1996.

The chairs of two committees of the Judicial Council (the Trial Court Presiding Judges Committee and the Court Administrators Advisory Committee) submitted a letter opposing the staff's recommendation and proposing instead that "a majority of the detailed policy issues should be addressed in California Rules of Court and Local Rules of Court, as under current practice." Judge Roger Warren appeared at the meeting and explained this position.

He said that proposed Government Code Section 70200 was acceptable, but should be expanded as set forth in his letter:

Proposed Government Code section 70200. Transitional rules of court

70200. The Judicial Council shall, before January 1, 1996, adopt rules of court not inconsistent with statute for:

(a) The orderly conversion on July 1, 1996, of proceedings pending in municipal and justice courts to proceedings in superior courts, and for proceedings commenced in superior courts on and after July 1, 1996.

(b) Selection of persons to coordinate implementation activities for the unification of municipal and justice courts with superior courts in each county, including:

(1) selection of a presiding judge for the unified superior court,

(2) selection of a court executive officer for the unified superior court, and

(3) appointment of court committees or working groups to assist the presiding judge and court executive officer in implementing trial court unification.

(c) The authority of the presiding judge, in conjunction with the court executive officer and appropriate individuals or working groups of the unified superior court, to act on behalf of the court to implement trial court unification.

(d) Preparation and submission of a written personnel plan to the judges of the unified superior court for adoption.

(e) Preparation of any necessary local court rules that shall, on July 1, 1996 be the rules of the unified superior court.

(f) Other necessary activities to facilitate the transition to a unified court system.

As for the other proposed statutes, Judge Warren said that they differ greatly from current practice. For example, the proposed statutes would define to some extent the duties and roles of presiding judges, but there are no existing statutes restricting the judiciary in this manner. Instead, these matters are governed by state and local Rules of Court. Similarly, proposed Government Code Section 70201(b) would give each presiding judge for unification “full authority of the court to make all decisions and perform all acts necessary for unification.” At present, however, the system is less autocratic and presiding judges lack blanket authority to do whatever they want on behalf of their courts. Likewise, proposed Government Code Section 70202 would make the presiding judge responsible for selecting a court’s

administrative officer, but traditionally such decisions have been made by all of the judges of a court. The proposed statutes would also make other significant changes in the way in which courts do business.

Judge Warren stated that trial court unification should not effect such changes. He stressed that management of the courts should remain a function of the judiciary, not the Legislature. In his opinion, replacing the traditional democratic approach to governing the courts with a more autocratic approach during trial court unification would not be helpful, and might prove counterproductive.

The Commission considered Judge Warren's remarks, as well as the view that the findings of the Justice Management Institute warrant use of an autocratic approach. Additionally, the Executive Secretary pointed out that proposed Government Code Sections 70200 *et seq.* might help alleviate concerns that the Judicial Council is usurping local control of the courts. The proposed statutes may also thwart aggrieved persons from challenging personnel decisions for lack of proper authority.

Based on the information before it, the Commission decided to adopt the general approach proposed by the chairs of the Judicial Council committees. The Commission did not, however, select specific language implementing this approach. Rather, it directed the staff to review the proposal and prepare a draft recommendation consistent with it. In the course of preparing its recommendation, the staff should circulate and solicit comments on the proposal from interested persons.

STUDY L-3044 – COMPREHENSIVE POWERS OF ATTORNEY STATUTE

The Commission considered Memorandum 94-10 and First Supplement concerning the comprehensive powers of attorney statute. The Commission decided not to include a definition of capacity in the statute. The Commission approved the redrafted provisions in the Exhibit to Memorandum 94-10 for inclusion in the recommendation.

The Commission revised proposed Sections 4053, 4902, and 4903 to read:

4053. A durable power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid and enforceable in this state to the same extent as a durable power of attorney

executed in this state, regardless of whether the principal is a domiciliary of this state.

4902. Except as provided in Section 4903, this part is not subject to limitation in the power of attorney.

4903. (a) Subject to subdivision (b), a power of attorney may expressly eliminate the authority of a person listed in Section 4940 to petition the court for any one or more of the purposes enumerated in Section 4941 or 4942 if both of the following requirements are satisfied:

(1) The power of attorney is executed by the principal at a time when the principal has the advice of a lawyer authorized to practice law in the state where the power of attorney is executed.

(2) The principal's lawyer signs a certificate stating in substance:

"I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

(b) A power of attorney may not limit the authority of the following persons to petition under this part:

(1) The attorney-in-fact, the principal, the conservator of the estate of the principal, or the public guardian, with respect to a petition for a purpose in Section 4941.

(2) The conservator of the person of the principal, with respect to a petition relating to a durable power of attorney for health care for a purpose in subdivisions (a), (c), or (d) of Section 4942.

(3) The attorney-in-fact, with respect to a petition relating to a durable power of attorney for health care for a purpose in subdivision (a) or (b) of Section 4942.

With these revisions, the Commission approved the recommendation for printing.

STUDY N-100 – ADMINISTRATIVE ADJUDICATION:
COMMENTS ON TENTATIVE RECOMMENDATION

The Commission considered Memorandum 94-13, analyzing comments received on the first part of the tentative recommendation on administrative

adjudication. The Commission made the following decisions concerning the matters raised in the memorandum.

§ 612.120. Application of division to local agencies

The Commission approved the staff recommendation not to make the administrative adjudication statute applicable to local agencies.

§ 612.150. Contrary express statute controls

The Commission approved the staff recommendation not to eliminate nonconforming statutes of particular agencies without a statute-by-statute analysis.

It was noted that the California Environmental Quality Act is not a statute “expressly applicable to a particular agency,” but might have procedures that are inconsistent with the draft APA. The staff should consider whether this statute should be preserved, and whether the language of Section 612.150 is adequate to do that. The staff should look for other statutes of general application that require a hearing and may need to be preserved, such as the California Public Records Act (Gov’t Code §§ 6250-6268), the Bagley-Keene Open Meeting Act, and the Public Contract Code.

The staff should consider whether Section 612.150 should say it does not prevail over any other statute, and not only statutes “expressly applicable to a particular agency.”

§ 612.160. Suspension of statute

The Commission approved the staff recommendation to permit the Governor to suspend an APA provision to avoid delay in receipt of federal funds or services.

§ 613.110. Voting by agency member

The Commission approved the staff recommendation to preserve the special statutory requirement of in-person voting for members of the State Water Board.

§ 613.120. Oaths, affirmations, and certification of official acts

The Commission approved the staff recommendation to keep the broad provision, drawn from existing law, for administering oaths and certifying acts. The Commission suggested the language authorizing the “secretary of an

agency” to administer oaths and certify acts be redrafted to say something like the “chief executive officer of the agency,” “director,” or “administrative officer.”

§ 613.210. Service

The Commission approved the staff recommendation to add to the Comment a reference to the definition of “authorized representative” in Sections 613.310-613.340.

§ 613.220. Mail or other delivery

The Commission decided not to require faxed or electronic service to be followed up with hard copy. The Commission suggested there be added a requirement of confirmation that the fax was complete and without error. See Cal. R. Ct., Rule 2008(e). There was concern about what “other electronic means” of transmission is, and whether E-mail transmission is acceptable. The Commission suggested the provision say “other electronic means as provided by regulation.” The staff should bring back a revised section for Commission consideration.

§ 613.230. Extension of time

The Commission decided to provide for a time extension of two court days when service or notice is by fax. This will make the APA consistent with civil practice. See Code Civ. Proc. § 1013(e); Cal. R. Ct., Rule 2008(b). The Commission decided to keep the five-day extension in Section 613.230, to make clear it applies not only to the APA itself but also to notices provided by agency regulation, and to make clear agencies cannot by regulation opt out from this provision.

The Commission reconfirmed its earlier decision to set out applicable time periods in the APA, and not to pick up the times in the Code of Civil Procedure by cross-reference.

§ 613.310. Self representation

The Commission decided to include in the statute that “In case of a party that is an entity, the entity may select any of its members to represent it, and is bound by the acts of its authorized representative.”

§ 613.320. Representation by attorney

The Commission approved the staff recommendation not to include a provision authorizing an agency to prohibit a particular attorney from practicing before it.

§ 614.110. Conversion authorized

The Department of Insurance was concerned that interlocutory judicial review of an administrative determination regarding conversion would bring the administrative proceeding to a halt. Professor Asimow is inclined to make such determinations non-reviewable, although this will not be addressed until judicial review is taken up.

§§ 614.120, 614.150

For lack of time, the Commission did not consider Section 614.120 or 614.150.

§ 641.110. When adjudicative proceeding required

The Commission tentatively decided to revise subdivision (a) of Section 641.110 as follows:

(a) An agency shall conduct a proceeding under this part as the process for formulating and issuing a decision ~~for which a hearing or other adjudicative proceeding is required by~~ where the federal or state constitution or by a statute requires that a hearing be given, requires that evidence be taken, and vests responsibility for the determination of facts in an agency.

The Commission asked the staff to bring this provision back to the Commission for another look.

**STUDY N-100 – ADMINISTRATIVE ADJUDICATION:
EXEMPTIONS FROM ADJUDICATION PROVISIONS OF APA**

The Commission considered Memorandum 94-11 and the First through Fifteenth Supplements concerning requests of state agencies for exemption of some or all of their hearings from the proposed administrative adjudication statute. After hearing testimony from the various agencies, together with a supplemental letter from the Occupational Safety and Health Appeals Board

(attached to these Minutes as an Exhibit), the Commission made the following decisions.

Hearings To Be Exempted

The Commission decided that hearings of the following agencies should be exempted from the adjudication provisions of the proposed administrative procedure act:

Alcoholic Beverage Control Appeals Board

Department of Corrections and related entities (Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Addict Evaluation Authority)

Public Utilities Commission

Commission on State Mandates.

The Commission asked the staff to notify the League of California Cities and the County Supervisors Association for their possible reaction to the Commission's decision to exempt the Commission on State Mandates.

Hearings Not To Be Exempted

The Commission decided that hearings of the following agencies should not be exempted from the adjudication provisions of the proposed administrative procedure act:

Department of General Services

Department of Social Services

Office of Statewide Health Planning and Development

Water Resources Control Board

Occupational Safety and Health Appeals Board

Unemployment Insurance Appeals Board.

Professor Asimow noted the Department of Social Services would be protected by Section 612.160, permitting the Governor to suspend all or part of the APA to prevent denial of federal funds or services. Professor Asimow and the Commission thought it was important this provision be adequate to avoid putting agencies in noncompliance with federal law, and thought the protections of this provision could be strengthened.

The Office of Statewide Health Planning and Development requested an express provision to codify their existing practice of using their own hearing officers, not OAH hearing officers. The Commission agreed to include such a

provision in the conforming revisions. In general, all agencies not now subject to the APA but which will be subject to the new APA should be expressly exempted from the requirement that hearings be conducted by an administrative law judge from the Office of Administrative Hearings.

The Unemployment Insurance Appeals Board had a problem with the reference in Chapter 9 to a “proposed” decision. UIAB does not issue proposed decisions — all are final unless appealed. UIAB had a problem with Section 649.230(b), requiring a remand to be to the presiding officer who formulated the proposed decision, if available. UIAB wants the freedom to remand to some other hearing officer, especially if bias appears. Professor Asimow thought this provision could be made subject to variation by agency regulation, except for agencies that use OAH hearing officers.

Agencies With Some Hearings Exempted and Other Hearings Not Exempted

The Commission decided for several agencies that some, but not all, of the hearings conducted by the agencies should be exempted from the APA.

ALRB and PERB

The Commission decided that hearings of the Agricultural Labor Relations Board and Public Employment Relations Board on certification elections, but not on unfair labor practices, should be exempted from the statute.

Department of Real Estate

The Commission decided to preserve existing special statutes applicable to the Department of Real Estate as recommended by staff.

Department of Health Services

The Department of Health Services did not ask for a blanket exemption, but asked to have exempted its procedure for review of a citation of a licensee of a long-term health care facility under Health and Safety Code Section 1428. Professor Asimow pointed out that this procedure would be exempt under Section 641.110(d) which exempts informal fact-finding and informal investigation.

The Department of Health Services asked to have exempted its procedure under Health and Safety Code Section 25845(a) for a non-APA hearing on granting or amending a license to handle radioactive materials or

determining compliance with or granting exceptions to departmental regulations, especially for massive hearings. Under this procedure, the hearing officer takes evidence but does not make the decision; the decision is made by the department based on the record. Professor Asimow suggested the APA could be applied with an exception to Section 649.110 so the presiding officer is not required to write the proposed decision. The Commission decided not to exempt DHS hearings under Section 25845(a).

The Department of Health Services asked to have exempted its negotiations with hospitals for Medi-Cal services under Welfare and Institutions Code Section 14087.27. The Commission thought contract negotiations should clearly be exempt from the APA, but adjudication of disputes under the contract should either be subject to the APA or as provided in the contract. The Commission asked the staff to take another look at this provision and give the Commission more background.

The Commission asked the staff to get the view of the Office of Administrative Hearings on whether the new APA should apply to Department of Health Services hearings under Health and Safety Code Section 38060 (disputes under direct service contracts between a nonprofit human services agency and the Health and Welfare Agency). Some of these hearings may be held by counties, so the view of the County Supervisors Association may also be relevant.

Professor Asimow disagreed with the staff recommendation to exempt hearings under Health and Safety Code Sections 310-319 (supplemental food program for women, infants, and children). The Commission did not decide the issue.

Professor Asimow disagreed with the staff recommendation to exempt assessment of penalties for false or illegal claims for Medi-Cal payments under Welfare and Institutions Code Section 14123.2. These proceedings are now under the APA under subdivision (c) of that section. The Commission decided these proceedings should remain subject to the new APA.

It was pointed out that Health and Safety Code Section 255 referred to on page 2 of the Fifth Supplement to Memorandum 94-11 does not deal with the Women, Infants, and Children Program. Rather it deals with California Children's Services Program, and says nothing about hearings.

The Commission asked the staff to bring back a redrafted memo on the Department of Health Services. The Commission noted the Fifth Supplement

recommended exemptions in more cases than the Commission has been willing to approve. The redrafted memo should be more stringent in recommending exemptions.

Hearings on Which the Commission Deferred Decision

The Commission deferred deciding whether hearings of the following agencies should be exempt:

Coastal Commission

Bay Conservation and Development Commission

Student Aid Commission.

The Commission asked the staff to look at federal statutes and regulations applicable to the Student Aid Commission and report back. See 20 U.S.C. § 1095A, and Code of Federal Regulations, Title 34, Part 682.

Other Issues

In view of the granting of the exemption request of the Public Utilities Commission, the staff should review compromises in the draft statute that were made to accommodate objections of the PUC, including provisions on judicial notice, separation of functions, and ex parte contacts.

The staff should research the question of whether the constitution or a statute requires a hearing on bid protests to the Department of General Services. The department said its statute is silent about this. (Its statute was modeled on the State Board of Control statute.) If a hearing is presently required, bid protest hearings should be subject to the new APA. If a hearing is not required, bid protests should not be subject to it.

The Coastal Commission suggested adding a provision to Section 612.110 that, "This division does not apply where by regulation or statute members of the public are authorized to participate in the proceedings without filing a motion to intervene." Professor Asimow thought this was unnecessary because under the draft statute the conference procedure will apply to all Coastal Commission hearings.

The Commission thought Section 647.130 should be revised to give the presiding officer discretion to require a formal adjudicative hearing when cross-examination appears necessary, rather than requiring the presiding officer to do so.

Interim or preliminary actions pending a hearing on a disciplinary sanction (“Skelly hearings”) should not be covered by the new APA.

Provisions that should apply to all agencies include those relating to separation of functions, ex parte contacts, bias, and judicial review.

Overview

There was concern that the draft statute is too confusing and hard to work through and understand. The statute should be reorganized and recast to accomplish a number of objectives:

(1) The structure of the statute and its application should be clear at the beginning of the statute.

(2) It should be clear at the beginning of the statute that hearings for which OAH personnel are required are governed by the statute, whereas hearings for which OAH personnel are not required are governed either by the statute or by the agency’s own regulations, at the election of the agency.

(3) It should be clear at the beginning of the statute how the conference hearing procedure works and its broad availability for agencies. Possibly a more descriptive name for that procedure should be used, such as “informal procedure.”

(4) In cases where the agency’s own regulations govern the hearing procedure, it should be clear at the beginning of the statute that the regulations must satisfy key mandatory provisions of the statute, such as ex parte contact limitations and other due process and public policy protections that can’t be opted out of. It should also be clear that as to optional provisions of the statute, the regulations may provide their own procedures or may adopt the statute.

(5) An agency’s regulatory procedure should be complete in itself or, if the procedure incorporates by reference the statute on a specific point, should indicate what statutory provisions are incorporated by reference. This would permit a user to get a complete picture from the regulations alone. OAL cautioned that the Legislature does not want the text of statutes to be reproduced in regulations.

(6) An agency’s regulatory procedure should include a provision at the beginning that indicates what specific parts of the regulatory procedure satisfy the mandatory provisions of the statute.

(7) An agency's adoption of its procedure should be simple, so that if the agency is merely incorporating by reference mandatory or other provisions of the statute, or merely specifying which parts of its regulations satisfy the mandatory provisions of the statute, OAL review is limited. OAL agreed to help draft a statute to facilitate adoption of regulations under the new APA.

(8) An agency's regulatory procedure should be complete and compiled in one place and made available to persons appearing before the agency.

The Commission suggested the staff write a letter to those who appeared before the Commission and whose exemption request was denied, noting that the Commission's goal is not to make administrative procedure more burdensome, but to accommodate to the needs of the agencies. The letter should point out that the Commission is taking steps to soften the burden by restructuring the proposed statute in a way that should make it more usable for the agencies.

- ☐ APPROVED AS SUBMITTED
- ☐ APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Date

Chairperson

Executive Secretary

DEPARTMENT OF INDUSTRIAL RELATIONS

**OCCUPATIONAL SAFETY
AND HEALTH APPEALS BOARD**

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February 10, 1994

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Administrative Adjudication: Response to Staff
Recommendation re Occupational Safety and Health Appeals Board
Request for Exemption

Dear Mr. Sterling:

We strongly urge the Commission to reject your staff's recommendation (Sixth Supplement to Memorandum 94-11) to include the Occupational Safety and Health Appeals Board in the new APA. Staff mistakenly focused on one area of concern mentioned in my letter of August 26, 1993, namely, regulations relating to pleading amendments. That reference, however, was intended to illustrate, by way of example, only one of innumerable difficulties the new APA would represent to our agency. Over the past four years, we have submitted five (5) separate memoranda expressing our concerns with the various drafts related to the administrative adjudicative project. Unfortunately, none of those were addressed by staff. I am therefore resubmitting my letters of May 23, 1990, November 20, 1990, March 27, 1991, January 16, 1992, and August 26, 1993 as Appendix A, for your review.

As you will note, the common thread running through each of my previous letters is the unique statutory scheme defining OSHAB's mission, which we feel places it at odds with a substantial portion of the revised APA. Please find copies of the pertinent Labor Code provisions (Sections 6600 through 6652) found at pages 121 through 129 of the attached OSHAB "Appeal Information" booklet. A glance through these provisions illustrates their impact on the procedural aspects of OSHAB's program--from the definition of an appeal period to provisions for recoupment of costs--and their variance from the new APA. To the extent that these Labor Code provisions would prevail over any subsequent enactment of the model new APA, it is unclear what portion of the APA would be left to apply to OSHAB proceedings.

In order to assist the Commission in understanding a typical OSHAB proceeding under our present regulatory scheme, in comparison

with events under the new APA, the following is a hypothesized proceeding. An employer, cited for an alleged unsafe or unhealthful work condition is advised of its rights to file an appeal with OSHAB within 15 working days, and provided with appropriate appeal forms, as well as OSHAB's appeal information booklet, containing all applicable statutes, regulations, table of contents, index, and an overview of the appeals process. Under the new APA, the employer would by necessity be directed to OSHAB regulations, as well as to the Government Code.

Thus, rather than a straightforward step-by-step guide through the administrative process, the employer would be faced with the task of reconciling the two schemes. This is an unnecessary and heavy burden to place upon our state's employers (many of whom appear personally at OSHAB hearings) and certainly not promotive of safety for California's working men and women. The reconciliation task would raise questions at every step of the administrative process: Are service and notice requirements appropriate under OSHAB rule 355 or APA Section 613.210 or 642.330? Can facsimile machines be used? (Compare OSHAB rule 355.1 with 613.220) How does the employer amend its appeal? Will the Division [the enforcement arm] be able to amend the charge up until the day of hearing or must all motions be filed at least 20 days before? (Compare OSHAB rule 371.2 with 642.360) How will discovery proceed? (OSHAB rules 372, 372.1 vs. 645.210/230)? Is recourse to superior court necessary? (OSHAB rule 372.6 or 645.310/360) Will there be prehearings or settlement conferences and what will they look like? (Compare OSHAB rules 374, 374.3, with 646.110/140, 646.210/230) How formal are the hearings and what will the written decision of the administrative law judge look like? (OSHAB rules 376.1, 385 vs. 648.210/80, 649.110/170) What would be the grounds for challenging a decision of the ALJ, and with whom should reconsideration be sought? (OSHAB rule 390; 649.210/250)

In essence, what is presently a very simple procedural framework will have become enormously complex. OSHAB's well established and historic efforts to make this a "user friendly" Board, easily accessible to the public, with readily understandable procedures, would have been thwarted by the generic APA.

Compounding the problem is the very specialized nature of OSHAB's constituents. The parties who participate in the typical OSHAB hearing are a very small group of employment health and safety practitioners--attorneys, safety engineers, and industrial hygienists, as well as lay persons. None are likely to have extensive dealings with other state agency hearing procedures, and thus would reap none of the benefits of a uniform APA. Indeed, the typical OSHAB practitioner is very much like a labor lawyer practicing before the Agricultural Labor Relations Board and the Public Employment Relations Board, with an even more specialized and technical expertise.

For these reasons, we urge OSHAB exemption from the model APA. Alternatively, we suggest the Commission consider limiting OSHAB's APA incorporation to the current statutory scheme. That is, Labor Code Section 6603(a) mandates OSHAB procedural rules be consistent with Government Code Sections 11507, 11507.6, 11507.7, 11510, 11513, 11514, 11515, 11516, and 11525. In all other respects, OSHAB procedures should be exempt from the new APA. This scenario would at least relieve OSHAB of the requirement of seeking OAL review of the non-APA regulations which have historically defined our procedures.

Unfortunately, the staff recommendation understates the burden to be placed on OSHAB to adopt conforming regulations, or rejustify its entire regulatory scheme, merely to conform to a new APA. OSHAB is a small agency, its entire legal staff comprised of one attorney and a legal analyst--significantly smaller than the Commission's own staff. The nine ALJs (including the presiding ALJ and one contractual annuitant), are all currently striving to handle 3200 appeals annually--the largest volume of cases since the inception of the Cal OSHA program in 1974. Under our statute, all parties are entitled to a full and prompt hearing, as well as review at the Board level. The full-scale review required by OSHAB's inclusion in the new APA would result in the Agency's assuming a disproportionate share of the burden of this exercise.

Respectfully submitted,



Elaine W. Donaldson,
Chairman California OSHA Appeals Board